FEDERAL COURT.

Chew Kok Chooi for the appellant.

Harun bin Hashim (Deputy Public Prosecutor) for the respondent.

Thomson, Lord President (delivering oral judgment): This appeal comes before this Court for rehearing by reason of the provisions of section 34 of the Courts Ordinance. Like other references to Court under that unfortunate section I am afraid it is not going to prove productive of very much light.

The appellant was convicted for possession of a still and of samsu in contravention of sections 17(1) and 73(1)(a) of the Excise Act, 1961. There were two charges on both of which she was convicted. On the second charge the sentence imposed was less than the minimum sentence prescribed by law.

The evidence for the prosecution does not call for recapitulation here. Suffice it to say that it depended largely on statements made by the appellant to a Revenue Officer. It also included findings by an analyst as to the nature of the contents of a number of receptacles found on the praises. That evidence made out that the contents were excisable liquor.

The appellant appealed against her convictions and the Public Prosecutor cross-appealed against her sentence in respect of the second charge.

On the hearing of the appeals Mr. Justice Syed Sheh Barakbah dismissed the appeal against conviction but allowed the appeal against sentence. He then gave his certificate for the matter to be re-argued before this Court.

In our view, the appellant's appeal is without substance.

There are two grounds of appeal.

The first ground of appeal is that the evidence of the Revenue Officer as to the statements made by the appellant was wrongly admitted. It was said to be inadmissible and wrongly admitted by reason of the provision of section 24 of the Evidence Ordinance, as discussed in this context by Spencer-Wilkinson J. in the case of *Chye Ah San* v. *Regina*,[1] on the ground that it was obtained by threats. In our view that was a question of fact which rested on questions of credibility. The questions of credibility were decided against the appellant by the learned Magistrate who tried the case at first instance and we know of no authority which would justify this Court in interfering.

The second ground of appeal is that there was non-compliance with the provision of section 61 of the Excise Act 1961, which reads as follows:

> "When any goods suspected of being dutiable or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle in which such goods are contained, and the Court shall presume that the goods contained, in the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened."

In our view, that ground of appeal is based on a misapprehension. It is quite clear that the Revenue Officers took possession of either all or part of the contents of every container alleged to contain excisable liquor. The amount of the sample is not in evidence in every instance.

In our view section 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the section as to the contents of all the packages arises. In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words "ten per centum" refer to the packages, not to the contents of each package.

On these grounds we are of the same view as the Judge in the High Court and hold that the appeal against conviction should be dismissed.

As regards the question of sentence, the fine imposed by the Judge was the minimum fine allowed by law. Of that, we fear, the appellant cannot complain. As regards the alternative sentence of imprisonment imposed in default of payment, that was a matter within the discretion of the Judge who varied the original fine and it would be wrong for us to interfere.

Appeal dismissed.

Solicitor:—*Kam Woon Wah & Co.*

NG WAN BEE v. F. KEITH SELLAR

[O.C.J. (Ong J.) October 10, 1963]

[K.L.—Civil Suit No. 106 of 1962]

Solicitor and client—Allegation of professional negligence—Frivolous and vexatious—Allegation of duress—Whether duress synonymous with negligence.

The plaintiff claimed against the defendant the sum of $29,924 being damages by reason of the defendant's negligence and improper conduct in respect of an arbitration and an action which the defendant undertook to perform for the plaintiff as the plaintiff's advocate and solicitor. With respect to the arbitration the plaintiff alleged that (i) the defendant negligently and unreasonably advised and induced the plaintiff against his

own will and consent to agree to the appointment of one Mr. Ross as sole arbitrator (ii) the defendant negligently and unreasonably failed to cause the completion of the said arbitration by an agreed date not later than January 14, 1959 and (iii) the defendant failed to attend an inquiry before the arbitration fixed for November 6, 1958....whereby the award in the arbitration was not given at all as agreed. In the matter of the action the plaintiff alleged that the defendant failed to take instructions on an appointed date and subsequently on the date of trial of the action he negligently rashly and unreasonably advised and induced the plaintiff to agree to the unfair terms of settlement. The defendant traversed all these allegations and pleaded that the particulars as set out did not constitute negligence or give rise to a cause of action.

Held: (1) the allegations of negligence with respect to the arbitration were not only groundless but frivolous and vexatious because the solution at all times lay in the hands of the plaintiff namely to take up the award after payment of the arbitrator's charges;

(2) duress is not synonymous with negligence. The suggestion of duress was so far-fetched as not to merit consideration.

ACTION.

Plaintiff in person.

Ng Ek Teong (*K. A. Menon* with him) for the defendant.

Cur. Adv. Vult.

Ong J.: "The plaintiff's claim against the defendant is for the sum of $29,924 being damages by reason of the defendant's negligence and improper conduct of the business which he undertook to perform for the plaintiff as the plaintiff's advocate and solicitor in 1958." So runs the indorsement of claim on the writ.

The plaintiff is a contractor, educated in Chinese but having only an elementary knowledge, if any, of English. Nonetheless the writ was issued and all subsequent proceedings were conducted by him in person.

In a statement of claim of unnecessary prolixity he alleged negligence by the defendant in respect of two matters, an arbitration and an action. Particulars of negligence were given, of which I make a precis below.

As to the matter of the arbitration he alleged (a) that the defendant "negligently and unreasonably advised and induced the plaintiff against his own will and consent to agree to the appointment of Mr. J. B. Ross as the sole arbitrator"; (b) that "the defendant negligently and unreasonably failed to cause the completion of the said arbitration" by an agreed date not later than January 14, 1959; (c) that the defendant failed to attend an inquiry before the arbitrator fixed for November 6, 1958...."whereby the award in the arbitration was not given at all as agreed."

In the matter of the action (Kuala Lumpur High Court Civil Suit No. 334 of 1955, *Mohamed Kunju* v. *Ng Wan Bee*) the plaintiff alleged that the defendant failed to take instructions on an appointed date and subsequently, on the date of trial of the action, he "negligently, rashly and unreasonably advised and induced the plaintiff to agree to the unfair terms of settlement."

By his defence the defendant traversed all the allegations and particulars of negligence and further pleaded that the particulars as set out in the statement of claim do not constitute negligence or give rise to any cause of action.

On June 29, 1962 the defendant's solicitors served on the plaintiff a notice to admit facts. The plaintiff delivered his admission of facts pursuant to such notice on July 19, 1962.

As to the arbitration, the plaintiff admitted that he agreed to the appointment of Mr. Ross as sole arbitrator, but qualified his admission thus: "That the defendant's advice was against the plaintiff and that he forced the plaintiff to accept his wrong advice." The plaintiff further admitted that the defendant appeared on his behalf at hearings before the arbitrator on November 28, December 22 and December 31 when the hearing was concluded and the arbitrator announced that he would give his award within 2 weeks. The plaintiff also admitted that he knew by February 1959 that the award was ready for delivery and would be delivered upon payment of the arbitrator's charges.

Various admissions were also made by the plaintiff with regard to the matter of the High Court action, but it is unnecessary to set them out in view of the plaintiff's answers to certain questions put to him by me in court.

On the date of trial of this action the parties first appeared before me in Chambers upon the hearing of an application by the defendant that the action be dismissed on the ground that the statement of claim disclosed no cause of action. I thought it more convenient to adjourn the hearing into open court and so ordered. Accordingly at the commencement of the trial I asked counsel for the defendant if he had submissions to make under Order 25 rule 2. He did so. Then I asked the plaintiff to make his reply but he complained that he had no counsel. I might mention at this stage that on an earlier occasion when this action had been set down for trial before me, I had allowed the plaintiff's application for adjournment expressly for the purpose of enabling him to obtain proper legal assistance. I therefore felt that it was no hardship on the plaintiff if I were to ask him the grounds on which he claimed to have a cause of action.

His answers were illuminating. With regard to the arbitration matter his complaint was

that the defendant should be held responsible for the award not being delivered. But the solution at all times in fact lay in his own hands. Either party to an arbitration can take up the award on payment of the arbitrator's charges; until payment the arbitrator has a lien on the award for his fees. Hence the allegations of negligence are not only groundless but frivolous and vexatious. The plaintiff's own bundle of documents (marked "A") abundantly bears out this view.

As to the matter of the action, Civil Suit No. 334 of 1955, the plaintiff admitted that he had "agreed in the presence of the Judge to the settlement terms as recorded," but said that he was forced into it. Duress is not synonymous with negligence. Even the suggestion of duress is so far-fetched as not to merit a moment's consideration.

I accordingly dismissed the action with costs.

Action dismissed.

Solicitors:—*Braddell & Ramani.*

PUBLIC PROSECUTOR v. THUI KUAN WING

[R.Cr.J. (Hashim J.) October 17, 1963]

[Kuantan — Criminal Revision No. 4 of 1963]

Criminal Procedure—Jurisdiction—Magistrate who is also President, Sessions Court—Cannot sit on Bench in dual capacity.

Criminal Procedure—Persons convicted under the Prevention of Crime Ordinance, 1959—Binding over of—Whether proper.

A Magistrate who is also a President of the Sessions Court cannot sit on the Bench in his dual capacity. If he finds that a case should properly go before the Sessions Court he should adjourn court if he is sitting as a Magistrate and register the case as a Sessions Court case. He should then sit again as President and deal with the case in that capacity.

The Prevention of Crime Ordinance deals with the prevention of crime. From the First Schedule to the Ordinance it could be seen that the persons affected by this Ordinance are members of unlawful societies, gangsters, extortioners, traffickers in opium chandu and other dangerous drugs, traffickers in women and girls and gambling promoters. To bind over such a person who has been convicted under this Ordinance is manifestly inadequate and would defeat the purpose of the Ordinance.

CRIMINAL REVISION.

Hashim J.: This case has been referred to me by the Deputy Public Prosecutor, Pahang.

The accused was charged in the Magistrate's Court, Temerloh under section 15(2)(e) of the Prevention of Crime Ordinance No. 13 of 1959. He pleaded guilty to the charge. The learned Magistrate convicted him and bound him over in the sum of $500 with 2 sureties for a period of one year under section 294(i) Criminal Procedure Code (Cap. 6). The penalty section is section 15(4) of Ordinance No. 13 of 1959 where the maximum sentence is 5 years.

I think I have said it before but I repeat that a Magistrate who is also a President of the Sessions Court must bear in mind that he cannot sit on the Bench in his dual capacity. He is sitting either as a Magistrate or as a President. If and when he finds that a case should properly go before the Sessions Court he should adjourn Court if he is sitting as a Magistrate and register the case as a Sessions Court case. He should then sit again as President of the Sessions Court and deal with the case in that capacity.

In this case the maximum sentence that can be imposed is 5 years imprisonment. There appears to be nothing in the Ordinance which empowers a Magistrate to try offences committed under this Ordinance. It would therefore logically follow that all offences under this Ordinance should be tried in a Sessions Court.

I would like to make one further observation. This Ordinance deals with the prevention of crime and I would invite attention to the First Schedule to the Ordinance under the heading "Registrable Categories". It could be seen that the persons affected by this Ordinance are members of unlawful societies, gangsters, extortioners, traffickers in opium, chandu and other deleterious drugs, traffickers in women and girls and gambling promoters. To bind over such a person who has been convicted under this Ordinance would appear to be manifestly inadequate and would defeat the purpose of the Ordinance. I would quote section 15(4) of this Ordinance:—

"A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years and not less than two years".

I quash the conviction and sentence and order that the accused be charged in the Sessions Court with the same charge.

Order accordingly.

SENIK v. HASSAN & ANOR.

[A.C.J. (Suffian J.) October 26, 1963]

[Alor Star — Kedah Civil Appeal No. 5 of 1963]

Land Laws—State Land—Kedah Enactment No. 56 (Land), s.28—Unlawful occupier dispossessed by trespasser—Whether occupier can sue in trespass for possession.

Practice—Jurisdiction—Waiver—Courts Ordinance, 1948, s.70—Attempt by parties to determine disputes in subordinate courts not be discouraged.